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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. TONY CHENG, Defendant and Appellant.	A139923 (San Francisco City & County Super. Ct. No. 219984)

BY THE COURT:[1]

A jury convicted defendant Tony Cheng of one count of misdemeanor assault (Pen. Code, § 240),[2] a lesser included offense of assault with a deadly weapon not a firearm, and one count of vandalism exceeding $400 (§ 594, subd. (b)(1)), a wobbler, which the trial court had reduced to misdemeanor vandalism. The trial court suspended imposition of sentence and placed defendant on three years' probation subject to numerous conditions, including compliance with an individualized treatment plan in cooperation with the probation department. Defendant's appellate counsel has raised no issues and asks this court for an independent review of the record to determine whether there are any issues that would, if resolved favorably to defendant, result in reversal or modification of the judgment. (*People v. Kelly* (2006) 40 Cal.4th 106; *People v. Wende* (1979) 25 Cal.3d 436.) Defendant was notified of his right to file a supplemental brief,

[1] Before Margulies, Acting P. J., Dondero, J. and Banke, J.

[2] All further references are to the Penal Code unless otherwise indicated.

and has done so. Upon independent review of the record, we conclude no arguable issues are presented for review, and affirm.

BACKGROUND

On November 28, 2012, the District Attorney for the City and County of San Francisco filed a three-count felony complaint alleging defendant committed: (1) assault with a deadly weapon against Maradona Truong (§ 245, subd. (a)(1)) on November 26, 2012; (2) assault with a deadly weapon against Camille Rozeira (§ 245, subd. (a)(1)) on November 26, 2012; and (3) vandalism (§ 594, subd. (b)(1).)

The complaint arose out of an incident at an Enterprise Car Rental office inside the Hotel Nikko in San Francisco, when defendant tried to renew a car rental.[3] When defendant's credit card was declined, he presented Truong with a debit card. The company's policy on the use of debit cards required the customer to provide two forms of proof of local residency. Defendant became angry and began to walk away toward the door. He then returned to the counter and threw each of the three computer monitors on the counter toward Truong. One was broken beyond repair and had to be replaced; the other two, were repaired. The wall behind the counter also had to be repaired, where one of the monitors hit it.

On November 28, 2012, counsel was appointed for defendant, bail was set, time was not waived and a preliminary hearing was set. After a time waiver, the preliminary hearing was continued several times until April 11, 2013.

Truong and Rozeira testified at the preliminary hearing. At the close of the hearing, the trial court held defendant to answer as to counts 1 (assault against Truong) and 3 (vandalism), and dismissed and discharged defendant as to count 2 (assault against Rozeria). The court also granted in part a defense motion to reduce the charges to misdemeanors, and reduced the vandalism charge.[4]

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[3] This summary of the incident is based on Truong's testimony at the preliminary hearing.

[4] If the damage caused by the act of vandalism is $400 or more, section 594, subdivision (b)(1), specifies the crime is punishable "by imprisonment pursuant to

On April 24, 2013, the district attorney filed a two-count information, alleging (1) assault with a deadly weapon not a firearm against Truong (§ 245, subd. (a)(1)); and (2) vandalism exceeding $400 (§ 594, subd. (b)(1)). Defendant was arraigned the following day, time was not waived and the case was set for trial on June 24, 2013.

Defendant made a number of in limine motions, including one to exclude a 2008 animal cruelty conviction (§ 597, subd. (b)) and one to allow testimony by his treating psychiatrist that he suffers from a mental illness and was psychotic on the day of the incident. As to the latter motion, defense counsel limited the proffered testimony to the misdemeanor vandalism charge, acknowledging there was no basis for its admission as to assault, a general intent crime. Counsel argued the evidence was relevant to the "maliciousness" requirement of vandalism, but acknowledged this was "murkier."[5] The court denied the motion, concluding the law focused on the act of vandalism, itself, to show maliciousness, and thus was a matter for the jury to decide. The court further concluded that even if the evidence was of any relevance, other factors such as undue consumption of time and juror confusion, warranted its exclusion under Evidence Code section 352.

Trial commenced with mini-opening statements and jury selection on June 20, 2013. Over the course of trial five witnesses testified, including Truong and Rozeira. All exhibits offered by defendant (three were withdrawn) were admitted into evidence.

At the close of the prosecution's case, defendant moved for acquittal as to the assault charge, arguing no reasonable juror could find the computer monitors constituted "deadly" weapons. Counsel pointed out Truong had sustained only a jammed finger from deflecting the first thrown monitor. The court denied the motion, ruling it was for the jury to decide whether a monitor would be capable of inflicting serious bodily injury.

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subdivision (h) of Section 1170 or in a county jail not exceeding one year." (§ 594, subd. (b)(1).)

[5] Section 594 provides in pertinent part: "(a) Every person who maliciously commits any of the following acts with respect to any real or personal property not his or her own . . . is guilty of vandalism: [¶] . . . [¶ (2) Damages. [¶] (3) Destroys."

Defendant then testified in his own defense. He is a graduate of Northwestern University with a degree in economics and international studies, and holds a master's degree in international policy studies from Stanford University and a master's degree in business administration from the European Institute for Business Affairs in Fontainebleau, France. At the time of trial he was 34. Since 2001, he has worked for five different companies, and since 2012 had been unemployed because of health issues. He had been renting a car for "pleasure," and also to store his belongings because he had "just relocated" from Singapore. He had wanted to use Singapore-based credit and debit cards to "draw down [his] account" there, and had numerous communications with Enterprise to try to do this. He finally went in person to the office on Mason Street. His interaction with Rozeira was unhelpful as she kept giving him "confusing" rental information. He found this particularly disconcerting because he had spoken to her in advance and she knew he was coming in for a further rental. Truong then took over, and at some point took the rental car keys defendant had laid on the counter. This make defendant "[u]pset" because he thought he had a right to the car for several more hours. When Truong told him his credit card had been declined, defendant thought he was lying. Defendant then presented a different card, and Truong asked for proof of local residency. Defendant had never had to supply that information before and claimed he had been using a debit card all along. Defendant was "upset and angry" and asked to see the manager. Defendant then began taking photos with his iPad. Truong told him to stop and, according to defendant, began "taunting" him with the car keys. Defendant then "created a distraction" by pushing the computer monitors "over the counter," hoping this would provoke Truong to come up with "a solution." He denied throwing the monitors. A "flood of security" from the Hotel Nikko entered, "pinned" him against the wall and handcuffed him.

The jury returned a verdict of not guilty on the felony assault charge, but guilty of the lesser included offense, simple assault, a misdemeanor (§ 240). It also found defendant guilty of vandalism. The jury was duly polled, confirming its verdicts were unanimous.

Since defendant had not waived time for sentencing, the case was called for sentencing two days later, on June 28, 2013. The court stated it had read all submissions, including those by the defense concerning defendant's medical condition, which it ruled should be sealed. The court indicated its intended sentence would be suspended imposition, and three years' probation conditioned on serving 120 days in county jail (credit for time served of four days) but stayed on compliance with an individualized treatment plan prepared in cooperation with the Adult Probation Department. The prosecutor opposed the indicated sentence, arguing defendant was a danger and pointing to his prior animal cruelty conviction for starving six dogs "to death while he was binging on methamphetamine" and that he was "very lucky" no one had gotten seriously injured during the instant incident. Moreover, he showed "no contrition." The prosecution did not believe defendant would cooperate with anybody, and asked that 60 days be imposed for both the assault and vandalism, to run consecutively. Defense counsel asked that the matter be put over for further work with representatives of the Behavioral Health Court to see if a probation plan could be put together to both ensure public safety and address defendant's mental illness. Defendant then waived time for sentencing and agreed to undergo an assessment for the Intensive Supervision Program.

On September 6, 2013, the court was advised defendant had been accepted into the program. The court then proceeded with sentencing, ordering the two counts to run concurrently, suspending imposition of sentence and placing defendant on three years' probation subject to numerous terms and conditions, including serving seven days in the county jail satisfied by credit for time served, and complying with the individualized treatment plan prepared by probation. The court further found defendant did not have any present ability to pay defense costs.

DISCUSSION

Upon review of the record, we discern no arguable issues.

Defendant was ably represented by counsel at all times. While defendant maintains otherwise in his supplemental brief, we cannot agree. Counsel made all appropriate efforts to have the charges reduced and conducted a vigorous defense at trial,

resulting in defendant's conviction of misdemeanor assault, rather than felony assault with a deadly weapon as charged. Counsel also took great initiative as to sentencing and successfully urged the trial court to suspend imposition of sentence and place defendant on three years' probation, with jail time stayed.

The trial court did not abuse its discretion in denying defendant's request to present testimony by his treating psychiatrist on the issue of "maliciousness" in connection with the vandalism charge. Evidence of mental impairment may be relevant to a specific intent crime. (§ 28, subd. (a).) Vandalism, however, is a general intent crime. As the Supreme Court explained in *People v. Atkins* (2001) 25 Cal.4th 76, 85 (*Atkins*), in general, the term " 'malicious,' as used in section 7, subdivision 4, does not transform an offense into a specific intent crime." Although the *Atkins* court was considering whether arson is a general intent crime, its reasoning is apposite and there is likewise nothing in the vandalism statute that requires the prosecution to prove the defendant specifically intended to damage the property at issue. "Language that typically denotes specific intent crimes, such as 'with the intent' to achieve or 'for the purpose of' achieving some further act, is absent from [section 594]. [Citation.] 'A crime is characterized as a "general intent" crime when the required mental state entails only an intent to do the act that causes the harm; a crime is characterized as a "specific intent" crime when the required mental state entails an intent to cause the resulting harm.' [Citation.]" (*Id*. at p. 86.) Because section 594 does not require an additional specific intent to damage or destroy the personal property of another, but instead requires only an intent to do the act that causes the harm, vandalism is a general intent crime. (*Atkins*, at p. 86; see also *People v. Kurtenbach* (2012) 204 Cal.App.4th 1264, 1282 [acting "maliciously" for vandalism purposes includes acting with ill will or intent to injure, or intentionally doing an act without justification, excuse or mitigation]; CALCRIM No. 2900.) Moreover, the trial court in any case, did not abuse its discretion in excluding the evidence under Evidence Code section 352. In his supplemental brief, defendant identifies other evidence of his mental health (reports by Dr. Ronald Johnson and

Dr. Karen Froming). Even had these reports been offered, they were not relevant to the charges for the same reasons.

Nor did the court err in denying defendant's section 1118.1 dismissal motion. There also was no error in the instructions. While defendant claims in his supplemental brief that CALCRIM No. 2901 should have been given, he is incorrect. That instruction instructs the jury to determine whether the charged vandalism resulted in damages of $400 or greater. As the trial court explained, this instruction is necessary when the jury must decide whether the prosecution has proven the damage element for felony vandalism. Here, however, the court had already reduced the vandalism charge to a misdemeanor, making the $400 benchmark irrelevant. With respect to assault, defendant claims the trial court did not instruct the jury that great bodily injury means "significant or substantial physical injury." Defendant is incorrect. The trial court did so. Nor did the court err in refusing to modify CALCRIM No. 875, instructing on "Assault with Deadly Weapon or Force Likely to Produce Great Bodily Injury," as requested by defense counsel to essentially confine such assault to the use of weaponry, such as "a gun, knife, or club." In any case, defendant was not convicted of this charge, so any asserted error as to the felony assault instruction is irrelevant.

The jury's verdicts are supported by substantial evidence. "In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction." (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) In his supplemental brief, defendant maintains, as he did at trial, that he merely pushed the computer monitors off the counter to create a diversion, and did not throw them at Truong. It was for the jury, however, to determine whether to credit defendant's or Truong's testimony. Our task is to determine whether any evidence, such as the testimony of any witness, supports the judgment. Here, Truong's testimony supports the convictions.

The trial court did not abuse its discretion in connection with sentencing. On the contrary, the court made a particularly thoughtful sentencing decision, balancing both public safety and defendant's particular circumstances. (See *People v. Olguin* (2008) 45 Cal.4th 375, 379 [appellate review of grant of probation and terms thereof is only for abuse of discretion].) All mandatory fees were duly imposed, and as to others, defendant was properly referred for assessment.

DISPOSITION

The judgment is affirmed.